Supreme Court, U.S.
FILED
'99 51 JUL 2 - 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SETH M. HUFSTEDLER
Counsel of Record
SHIRLEY M. HUFSTEDLER
DIANE E. PRITCHARD
MORRISON & FOERSTER LLP
555 West Fifth Street,
Suite 3500
Los Angeles, California
90013-1024
(213) 892-5200

Counsel for Petitioners

F. PHILIP CARBULLIDO
OLIVER W. BORDALLO
CARBULLIDO, BORDALLO & BROOKS LLP
251 Martyr Street,
Suite 101
Agana, Guam 96910
(671) 472-6848

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Ninth Circuit prejudicially err in holding that the first paragraph of the Guam Organic Act (48 U.S.C. § 1422), which is applicable solely to gubernatorial elections and requires runoff elections only when a gubernatorial slate has not received a majority of votes in that election, forced a runoff election despite petitioners having received the majority of all valid votes cast in the gubernatorial race

(1) by rewriting the statutory words "in any election" to state "in any general election in which the gubernatorial election is a part,"

(2) by rewriting the statutory words a "majority of votes cast in any election" to mean a "majority of ballots cast in any general election," and

(3) by counting as "votes" ballots that are invalid under Guam election statutes, thereby placing the Ninth Circuit in direct conflict with the Third Circuit's interpretation of the identical language of the Virgin Islands Organic Act (48 U.S.C. § 1591) in *Todman v. Boschulte*, 684 F.2d 939 (3d Cir. 1982)?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: petitioners Carl T.C. Gutierrez and Madeleine Z. Bordallo and respondents Joseph F. Ada and Felix P. Camachó.[1]

[1] The Government of Guam, the Guam Election Commission, and its commissioners, Joseph F. Mesa, Joseph T. Duenas, Frederick J. Horecky, Douglas B. Moylan, Rosanna D. San Miguel, and Leonila L.G. Herrero, were named as defendants in the proceeding in the United States District Court for the District of Guam but were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit and are not parties to the proceeding before this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	6
I. The Decisions of the Ninth and Third Circuits Are in Direct Conflict	6
II. The Ninth Circuit Has Impermissibly Rewritten 48 U.S.C. § 1422	9
III. The Importance of the Question Presented	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

CASES

County of Cass v. Johnston, 95 U.S. 360, 24 L.Ed. 416 (1877) 7

Todman v. Boschulte, 684 F.2d 939 (3d Cir. 1982) ... 6, 7, 14

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 1

28 U.S.C. § 1292(a)(1) 1

28 U.S.C. § 1331 1

48 U.S.C. § 1422 ..... *passim*

48 U.S.C. § 1591 ..... 3, 6

3 Guam Code Ann. § 11111 ..... 3, 9

3 Guam Code Ann. § 11114 ..... 3, 9

PETITION FOR WRIT OF CERTIORARI

Carl T.C. Gutierrez and Madeleine Z. Bordallo respectfully petition for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is certified for publication but not yet reported. (Appendix, A-1 – A-23.) The Ninth Circuit's order denying the petition for rehearing is unpublished. (Appendix, A-61 – A-62.)

The order of the United States District Court for the District of Guam is unpublished. (Appendix A-24 – A-56.)

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 19, 1999.[2] The Court of Appeals denied a timely petition for rehearing and suggestion for hearing en banc on May 25, 1999.

[2] The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 48 U.S.C. § 1422 (action arising under federal law).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Organic Act of Guam, 48 U.S.C. § 1422, first paragraph, provides:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.[3]

[3] The remainder of the Act is unrelated to gubernatorial elections.

The Virgin Islands Organic Act, 48 U.S.C. § 1591, first paragraph, provides:

> The Governor of the Virgin Islands, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the legislature of the Virgin Island. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

Title 3 of the Guam Code Ann. § 11111 provides, in pertinent part, that "[a]ny ballot which is not marked as provided by law shall be void . . . ."

Title 3 of the Guam Code Ann. § 11114 provides, in pertinent part:

> If a voter indicates . . . the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.[4]

[4] The entire text of the relevant Guam election laws appears in the Appendix at A-63.

STATEMENT OF THE CASE

On November 3, 1998, Guam held a general election in which Carl T.C. Gutierrez and Madeleine Z. Bordallo ("Gutierrez") ran against Joseph F. Ada and Felix P. Camacho ("Ada") for the offices of Governor and Lieutenant Governor, respectively. These were the only two slates running. Gutierrez received 24,250 votes, and Ada received 21,200 votes, giving Gutierrez a margin of a little over 3,000 votes. Under 48 U.S.C. § 1422, the voters were to cast one vote for the two offices on each gubernatorial slate.

In the general election, 1,313 persons who voted did not cast a vote in the gubernatorial election although they voted for other offices; 1,294 voters filled in the space indicating that they intended to vote for a write-in candidate, but 1,019 of them did not write in the name of any candidate; and 609 persons voted for both slates. Gutierrez received a majority of the votes cast unless *all three* of the categories described are also counted as "votes cast"; if any one of these three categories in excluded, Gutierrez won.

The Guam Election Commission certified that the Gutierrez slate had won with 51.21% of the vote. (From the total ballots of 48,666, the Commission deducted the 1,313 blank ballots, leaving a total of 47,353. 24,250/47,353 = 51.21%.)

On December 1, 1998, Ada filed a complaint in the United States District Court for the District of Guam seeking relief declaring that Gutierrez had not won.

The Organic Act of Guam governs gubernatorial elections. The first paragraph of 48 U.S.C. § 1422 deals solely with the gubernatorial election in Guam. It provides, in part:

> *If no candidates receive a majority of the votes cast in any election,* on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. [Emphasis added.]

On December 9, 1998, the district court ruled in Ada's favor. The court held that all ballots in the general election had to be counted as "votes cast" in the gubernatorial race to determine a majority, including those on which no gubernatorial vote was cast. As thus construed, the court held that Gutierrez failed by 83 votes to achieve a majority. The district court ordered a runoff election to be held on December 19, 1998. (Appendix, A-24 – A-56.)

Gutierrez immediately filed an appeal and an emergency motion to stay the runoff election. The motion for stay was granted by the Ninth Circuit on December 15, 1998. (Appendix, A-57 – A-58.)

The Ninth Circuit affirmed the district court's decision by opinion filed April 19, 1999. (Appendix, A-1 – A-23.) The court said that the words "any election" as used in the clause "[i]f no candidates receive a majority of the votes cast in any election" could not refer solely to the

gubernatorial election. Instead, according to the Ninth Circuit "in any election" means "the general election" of which the gubernatorial election was a part. (Appendix, at A-8 – A-9.) The court recognized that counting all the "votes cast" at the general election would reach "an absurd result" with respect to the gubernatorial race. To avoid that absurdity, the court said that the words "votes cast" should be read to mean ballots issued and returned in the general election. (Appendix, at A-10 n.5.)

Gutierrez filed a petition for rehearing and suggestion for rehearing en banc, which was denied on May 25, 1999. (Appendix, A-61 – A-62.) Gutierrez filed a motion to stay issuance of the mandate pending petition to this Court for a writ of certiorari. The Ninth Circuit granted the motion to stay issuance of the mandate, on May 27, 1999. (Appendix, A-59 – A-60.)

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS OF THE NINTH AND THIRD CIRCUITS ARE IN DIRECT CONFLICT

The Ninth Circuit acknowledged that its decision conflicts with *Todman v. Boschulte*, 684 F.2d 939 (3d Cir. 1982). In interpreting the language of the Virgin Islands Organic Act (48 U.S.C. § 1591), which is identical to the language of the Guam Organic Act (48 U.S.C. § 1422), the Third Circuit addressed the question whether ballots left blank as to the gubernatorial race should be counted in determining whether a gubernatorial slate had received a majority of the "votes cast" within the meaning of the statute. The Third Circuit held that those ballots left

blank as to the governor's race were not "votes cast": " 'Voters . . . *not voting on the matter submitted* are presumed to assent to the expressed will of those attending and voting and *are not to be taken into consideration in determining the result.*' " 694 F.2d at 941 (emphasis added). *Todman* is based on the principle enunciated by this Court in *County of Cass v. Johnston*, 95 U.S. 360, 24 L.Ed. 416 (1877), that qualified voters who do not choose to vote are deemed to assent to the choices of the voters who do vote. 95 U.S. at 369.

No choice in a gubernatorial election is expressed by persons who cast no vote in that race, even if such persons cast a vote for a different elective office on the same ballot. Those persons are in the same situation as to the gubernatorial race as the voter who stayed home on election day. Therefore ballots containing no votes in the gubernatorial race should not be counted as "votes cast." But even if all of the ballots were counted including those of persons who indicated they would vote for a write-in candidate but did not, the Gutierrez slate unquestionably won a majority:

Gutierrez	24,250
Ada	21,200
Write-in Ballots	1,294
Total	46,744
Majority needed to win	23,373

Gutierrez's receipt of 24,250 votes thus exceeded the majority of the votes cast by 877 votes.

Ada appears to have counted the "votes cast" as follows:

Gutierrez	24,250
Ada	21,200
Write-in Ballots	
Candidate named	275
Candidate not named	1,019
Blank ballots	1,313
Votes for both slates	609
Total	48,666
Majority needed to win	24,334

Ada argued that Gutierrez was short of a majority by 84 votes.[5]

The Guam Election Commission, however, certified that the Gutierrez slate had won with 24,250 of the 47,353 ballots (which was the total number of ballots of 48,666, less the 1,313 blank ballots).

The Gutierrez slate unquestionably won a majority of the votes cast unless "votes cast" includes all of the following: ballots on which no votes were cast in the gubernatorial election; ballots which indicated they were "write-in" but on which no write-in candidate was named; and spoiled (improperly marked) ballots.[6]

---

[5] Notably, to reach this result, Ada must count as "votes cast" all of the following: (1) ballots on which no vote was cast in the gubernatorial race, (2) write-in ballots which were blank as to the name of a candidate, and (3) invalid ballots on which persons voted for both slates. If any of these categories is omitted from the calculation, Gutierrez received a majority.

[6] This is consistent with the applicable election laws of Guam, which direct that ballots left blank as to a particular race, overvotes, and spoiled ballots are not to be counted for purposes of that race. As provided in the Guam Election Code, "If a voter indicates . . . the choice of more than there are candidates to be elected or certified for any office, *or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for that office*. . . . " 3 Guam Code Ann. § 11114 (emphasis added). *See also* 3 Guam Code Ann. § 11111 ("any ballot which is not marked as provided by law shall be void . . . ").

II. THE NINTH CIRCUIT HAS IMPERMISSIBLY REWRITTEN 48 U.S.C. § 1422

Section 1422 of Title 48 is straightforward in its application to gubernatorial elections. Yet instead of applying the statute as written, the Ninth Circuit isolated one phase – "in any election"; took it completely outside of the context in which the phase was used; and then substantively rewrote the statute.

The first paragraph of Section 1422 deals solely with gubernatorial elections. The fourth sentence of that paragraph provides that, "[i]f no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held. . . . " The most logical interpretation of this phrase, the only interpretation supported by the syntax in which the phrase appears, and an interpretation entirely consistent with the rules of statutory construction is that the phrase "in any election" means "in any *gubernatorial* election." That is the singular focus of the provision at issue. Indeed, the sentence preceding those words is limited to gubernatorial elections, and the sentences following those words address specifically the first election for Governor and Lieutenant Governor, as well as the subsequent gubernatorial elections to be held every four years.

Furthermore, the third sentence of Section 1422 states that "[t]he Governor and Lieutenant Governor shall be chosen jointly, by the *casting* by each voter of a *single vote* applicable to both offices." [Emphasis added]. This sentence makes clear that Congress intended that a "vote cast" is a single vote that is in fact *cast* in the *gubernatorial* election. Thus, the plain language of Section 1422 clearly limits the phrase "votes cast in any election" to the gubernatorial election.

The Ninth Circuit rejected this simple, straightforward, and logical construction of this provision. Instead, the court isolated the phrase "in any election" from the context in which it appears and determined that in order to win a majority of votes cast in any election, a gubernatorial slate must win a majority of *all votes* cast in the *entire general election*. "Congress intended 'votes cast' to constitute the votes cast for *any* of the offices up for election at the general election; that is, the number of ballots cast." (Appendix, at A-9 – A-10.) According to the court, this construction is necessary in order to give meaning to the phrase "in any election." The court said:

> We read "votes cast" as including all votes cast at the general election, for Congress presumably would not have included the phrase "in any election," if it meant to refer only to votes cast in the single election for governor and lieutenant governor.

(Appendix, at A-9.)

The court's expanded interpretation of the phrase "in any election" not only takes the phrase out of context, but, contrary to the court's assertion, is not necessary to give it meaning. The phrase "in any election" is given

meaning by the fact that the statute refers to both the initial gubernatorial election and subsequent gubernatorial elections (*i.e.*, in any of the *gubernatorial* elections, whether the first or a subsequent one specifically discussed in Section 1422).

The court also disregarded Congress' intent that a vote cast is a single vote that is in fact cast in the gubernatorial race. The court said that the third sentence of Section 1422, as set forth above, simply requires that the candidates for Governor and Lieutenant Governor run as a single slate. The court failed to recognize that a vote cast is required to be cast in the manner described, *i.e.*, "by the casting by each voter of a single vote . . . . " Returning a ballot upon which a person has voted for a candidate in an election other than for Governor and Lieutenant Governor does not meet the test for a vote cast because that person did not "cast[ ] . . . a single vote applicable to both offices." The statute does not state that a vote is "cast" by returning a ballot or by returning a ballot upon which the person has cast two votes (one for each slate), or by returning a ballot that contains no vote for Governor.

Even more significant, the court was forced to substantively rewrite the statute in order to support its construction. The court impermissibly substitutes the concept of "ballots" for "votes."

> [Petitioners argue] that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately 1 million votes

that were cast for all candidates for the various offices. The absurdity of this result strongly suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast." However, giving effect to the phrase "in any election" in such a way as to avoid an absurdity is preferable to reading the phrase out of the statute entirely.

(Appendix, at A-10 n.5.)

As the court observed, its "interpretation equates 'votes cast' with 'ballots cast.' " That is not what the statute says. Nor, as explained above, is such a substantive modification of the statute necessary to give effect to the phrase "in any election." By eschewing the most logical, common sense interpretation of that phrase, the court is led from one distortion to another. A simple reading of the ordinary language of the statute shows that the Ninth Circuit decision is wrong. Nothing in the statute suggests that "ballots" – not votes – should be counted. Nothing in the statute suggests that "votes cast" includes votes that are not cast.

The court offered no explanation for its cavalier disregard for or invalidation of the applicable Guam election statutes that do not count overvotes, undervotes and spoiled ballots. The court likewise disregarded the interpretation of Guam's election statutes by the Election

Commission which has been charged with the responsibility of interpreting and applying those statutes.

Finally, the court's decision is unsettling because it compels a runoff election in a situation in which it was never intended. A runoff election, as understood in the traditional sense, occurs when there are more than two candidates running, and while one of the three (or more) may win a plurality, none wins a majority. That is the situation in which a true "runoff" occurs between those two candidates who garnered the highest and second highest number of votes of the three (just as Section 1422 says). In the present case, the exact same two gubernatorial slates would repeat the election held last November and, under the Ninth Circuit's interpretation of Section 1422, this "runoff" election could potentially be repeated in perpetuity.

III. THE IMPORTANCE OF THE QUESTION PRESENTED

The election of the Governor and Lieutenant Governor of Guam and the Virgin Islands is every bit as important to the citizens of those American Territories as gubernatorial elections are to the citizens of the several States. Indeed, it can be argued that the election of Governor in the American Territories is of even greater significance to the people of the Territories insofar as they have no voting representatives in Congress and no electoral votes to determine our country's President. The Governor of the Territory is the highest elected officeholder representing the people of the Territory, and therefore the validity and integrity of these elections are even more

vital to preserve the limited democratic rights accorded the people of the Territories. The confidence of the citizens in the fairness and reliability of the election process is indispensable. Public perception of the judiciary is likewise affected when courts have been asked to intervene in that process. Traditionally the federal judiciary has quickly responded to electoral challenges, and the courts have ordinarily answered election issues in a way voters can understand, as typified by *Todman*.

The people of Guam who have read the opinions below will have great difficulty understanding why the courts have required a second election when one slate had a clear majority of all the valid votes cast in the gubernatorial election.

Runoff elections cause a host of political problems, not the least of which is political instability. Compelling a runoff election – especially when none should have been ordered – imposes serious costs on Guam's citizenry. Moreover, a runoff election can change results because the number of qualified votes can change in the interim, and voters who voted the first time may not bother to do so the second time around. The whole community must bear the costs and disruption of litigation and of runoff elections.

The citizens of Guam are entitled to have the statutes governing their elections interpreted in accordance with their ordinary plain meaning. Nothing in the language of Section 1422 or in Guam's election laws is obscure. It is the convoluted reasoning of the Ninth Circuit that is baffling.

Unless this Court grants review, the same statutory language in the election law applicable to gubernatorial races in the Virgin Islands and Guam will remain in conflict thereby assuring that different election results will occur in Guam and the Virgin Islands on the same facts. Without resolving the conflict, future litigation in election cases is virtually guaranteed in those Territories.

The decision of the Ninth Circuit is so clearly erroneous that a summary reversal would be appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 1, 1999

Respectfully submitted,

SETH M. HUFSTEDLER
Counsel of Record
SHIRLEY M. HUFSTEDLER
DIANE E. PRITCHARD
MORRISON & FOERSTER LLP
555 West Fifth Street,
Suite 3500
Los Angeles, California
90013
(213) 892-5200

F. PHILIP CARBULLIDO
OLIVER W. BORDALLO
CARBULLIDO, BORDALLO
& BROOKS LLP
251 Martyr Street, Suite 101
Agana, Guam 96910
(671) 472-6848

Counsel for Petitioners

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, *Plaintiffs-Appellees*, v. GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION, and its commissioners; JOSEPH F. MESA, Commissioner; JOSEPH T. DUENAS, Commissioner; FREDERICK J. HORECKY, Commissioner; DOUGLAS B. MOYLAN, Commissioner; ROSANNA D. SAN MIGUEL, Commissioner; LEONILA L.G. HERRERO, Commissioner, *Defendants*, and CARL T. C. GUTIERREZ; MADELEINE Z. BORDALLO, *Real Parties in Interest-Appellants*.	No. 98-17306 D.C. No. CV 98-066 OPINION

Appeal from the District Court of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted
March 8, 1999 – San Francisco, California

Filed April 19, 1999

Before: John T. Noonan and A. Wallace Tashima, Circuit Judges, and Jane A. Restani, Court of International Trade Judge.*

Opinion by Judge A. Wallace Tashima

COUNSEL

Seth M. Hufstedler, Morrison & Foerster, San Francisco, California, F. Philip Carbullido, Carbullido, Bordallo & Brooks, Agana, Guam, for the real parties in interest-appellants.

Dennis Riordan, Riordan & Rosenthal, San Francisco, California, Curtis Charles Van de Veld, The Van de Veld Law Offices, Agana, Guam, for the plaintiffs-appellees.

OPINION

TASHIMA, Circuit Judge:

On November 3, 1998, Guam held a general election in which Carl T.C. Gutierrez and Madeleine Z. Bordallo (together "Gutierrez") ran against Joseph F. Ada and Felix P. Camacho (together "Ada") for the offices of governor and lieutenant governor, respectively. Gutierrez received 24,250 votes, and Ada garnered 21,200 votes. After the Guam Election Commission certified Gutierrez as the winner, Ada filed suit in federal court seeking a declaration that Gutierrez was not elected by a majority of the votes cast, as required by the Guam Organic Act

* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

and a writ of mandamus requiring a runoff election to be held. The district court granted Ada's petition for a writ of mandamus. Gutierrez appeals, contending that the district court misinterpreted federal law and therefore erred in ordering a runoff election. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1),[1] and we affirm.

[1] In his complaint, Ada challenged the election results on two bases: that the district court misinterpreted federal law and that the election had been riddled with voting irregularities. The district court deferred addressing the latter issue:

> Though the Court now restricts this ruling to the isolated issue of interpretation of the Organic Act, the Court defers rather than rejects ruling on the other aspects of the election. If the territory's administrative and judicial corrective process timely and sufficiently addresses other questions and discrepancies of the election, thereby affording fundamental fairness to the voters of this territory, further intervention of a federal court should not prove necessary. If it does not, then, this Court will intervene.

Because the district court's order did not provide Ada with all of the relief he sought, and because the district court did not certify the entry of a final judgment pursuant to Federal Rule of Civil Procedure 54(b), Ada's appeal is interlocutory in nature, despite the parties' agreement that we have jurisdiction under 28 U.S.C. § 1291.

28 U.S.C. § 1292(a)(1), however, authorizes appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1) (1998). It is immaterial that the district court's order was labeled a writ of mandamus instead of an injunction because "[i]n determining the appealability of an interlocutory order under 28 U.S.C. § 1292(a)(1), we look to its substantial effect rather than its terminology." *Armstrong v. Wilson*, 124 F.3d

I.

48 U.S.C. § 1422 sets forth the qualifications for the offices of governor and lieutenant governor of the Territory of Guam and the electoral procedures for filling these offices. *See* 48 U.S.C. § 1422 (1987). The governor and lieutenant governor are elected jointly; therefore, candidates for these offices must run together on a slate. *See id.* The prevailing candidates are those who receive a majority of the votes cast. *See id.*

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

Id.

At stake at the general election on November 3, 1998, were the offices of governor and lieutenant governor,

---

1019, 1021 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998) (quoting *Tagupa v. East-West Ctr., Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981)) (internal quotation marks omitted) (alteration in original). Because the district court's order had the same effect as a mandatory injunction, this court has jurisdiction pursuant to § 1292(a)(1). *See Tagupa*, 642 F.2d at 1129 (finding the denial of a writ of mandamus appealable under § 1292(a)(1)).

delegate to the United States Congress, membership in the Guam legislature, and on various school boards. The Democratic gubernatorial slate of Gutierrez and Bordallo garnered 24,250 votes and the Republican gubernatorial slate of Ada and Camacho received 21,200 votes. An additional 1,294 voters voted for write-in candidates; 1,313 persons who voted in the general election neither voted for a gubernatorial slate nor cast a write-in vote ("blank ballots" or "undervotes"); and 609 persons voted for both slates ("overvotes"). The sum of these ballots was 48,666, of which Gutierrez received 49.83% and Ada received 43.56%.

On November 16, the Guam Election Commission[2] certified that the Gutierrez slate had won with 51.21% of the vote. The Election Commission arrived at this result by deducting the 1,313 undervotes from the total ballots cast, resulting in a total of 47,353 ballots. Write-in ballots and overvoted ballots were included in the total from which a majority was determined.

On December 1, Ada filed a complaint in the District Court of Guam seeking a declaratory judgment that Gutierrez had not been elected by a majority of the votes cast, as required by § 1422, and a writ of mandamus ordering that a runoff election be held.[3] On December 9, the

---

[2] The Guam Election Commission is composed of three individuals nominated by the Republican Party, three individuals nominated by the Democratic Party, all selected by the governor, and a seventh member selected by the other six members. At the time of the November 3 election, the seventh member had not been selected..

[3] On the same day, Ada filed a companion lawsuit in Guam Superior Court, which the district court characterized as

district court held in favor of Ada and granted a writ of mandamus ordering that a runoff election be held on

---

"focus[ing] on interpretation of local law and allegations of voting irregularity, not the federal question." On February 16, 1999, the Superior Court found that Ada had failed to prove his allegations of election irregularities and held that the Gutierrez slate had won the election. *See Ada v. Gutierrez*, No. CV 2765-98, at 233 (Guam Super. Ct. Feb. 16, 1999). In so finding, the Superior Court "respectfully disagreed with the determination reached by the District Court on the majority issue, and with regard to the above captioned matter, such determination shall be applied to the issues involved herein." *Id.* at 85. Specifically, the Superior Court decided that undervotes, overvotes, and write-in votes for which the voter selected the write-in option but did not write in a name should not be counted as "votes cast." *See id.* at 83-84.

Gutierrez does not contend that the Guam Superior Court's order should be given preclusive effect. We agree that we are not bound by the decision of the Guam Superior Court, if for no other reason than because it is currently on appeal to the Supreme Court of Guam. Although we find no Guam decision holding that a judgment on appeal has no preclusive effect, title 6, § 4209 and title 7, § 26707 of the Guam Code, which govern the preclusive effect of final judgments, are essentially identical to California Civil Procedure Code §§ 1908 and 1049 respectively, and therefore should be similarly interpreted. "Appellate courts have consistently recognized that decisions of California courts which predate the enactment of the Territorial Laws are controlling authority on issues of the statutory construction and effect of Guam laws, and that California cases subsequent to the adoption of the Guam codes while not binding, are persuasive." *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975). It has been long established in California that a judgment is not final for purposes of res judicata while the judgment is on appeal. *See, e.g., Brown v. Campbell*, 35 P. 433, 436 (Cal. 1893) (citing Cal. Civ. Proc. Code. § 1049); *Agarwal v. Johnson*, 603 P.2d 58, 72 n.11 (Cal. 1979) (same). Therefore, it appears that the Guam Superior Court's order is not entitled to preclusive effect.

December 19.[4] On December 15, a motions panel of this court issued an emergency stay of the district court's order pending the outcome of this appeal.

Gutierrez contends that the district court erred in issuing the writ of mandamus because the inclusion of undervotes in the "votes cast" contradicts the plain language of § 1422, prior case law, Guam election law, and common sense.

II.

We review the district court's decision to issue a writ of mandamus for an abuse of discretion. *See Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997). A district court abuses its discretion if "its decision is based on clearly erroneous factual findings or an incorrect legal standard." *Id.* The interpretation of a statute is a question of law reviewed de novo. *See Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998).

III.

As with all exercises in statutory interpretation, we begin with the statute's text. We "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the

---

[4] The order provides, "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Guam Election Commission shall hold a runoff election as referred to in § 1422 of the Organic Act. The runoff election between the Democratic and Republican gubernatorial candidates shall be held on Saturday, December 19, 1998."

intent of Congress." *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir. 1997) (internal quotation marks omitted) (citation omitted). If the statute is ambiguous, resort to legislative history is appropriate. *See id.*

A. 48 U.S.C. § 1422

Gutierrez argues that § 1422 is unambiguous in including only votes actually and validly cast for the gubernatorial race in the calculation of a majority. By employing the phrase "votes cast," Gutierrez contends that Congress necessarily excluded ballots on which votes were not cast for governor and lieutenant governor. Furthermore, Gutierrez urges that the sentence "The Governor and Lieutenant Governor shall be chosen jointly, *by the casting by each voter of a single vote* applicable to both offices," § 1422 (emphasis added), implies that "votes cast" encompasses actual votes – not ballots blank with respect to the governor's race. Gutierrez also relies on legislative history to buttress his interpretation.

Ada reaches a contrary conclusion by relying on a different portion of § 1422: "If no candidates receive a majority of the votes cast *in any election*, on the fourteenth day thereafter a runoff election shall be held. . . . " § 1422 (emphasis added). Ada argues that if Congress had intended for a majority to be measured by the votes cast only in the gubernatorial race rather than the votes cast in the entire election, it would have said so, instead of using the phrase "in any election."

Section 1422 provides for a runoff election in the event that "no candidates receive a majority of the votes

cast in any election." Because Congress provided no other direction in § 1422 for determining what constitutes a majority, we must give effect to these words. We read "votes cast" as including all votes cast at the general election, for Congress presumably would not have included the phrase "in any election," if it meant to refer only to the votes cast in the single election for governor and lieutenant governor.

Gutierrez would have this court reject this interpretation because in providing that the victors "shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices," Congress made clear its intent that an actual vote must be cast for a gubernatorial candidate to constitute a vote cast for purposes of calculating a majority. This interpretation is problematic because it renders the phrase "in any election" a nullity, and thus violates "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988).

Furthermore, Gutierrez's interpretation requires the phrase "by the casting by each voter of a single vote" to carry more weight than it can support. This phrase merely establishes the requirement that candidates for governor and lieutenant governor run on a single slate. It is the sentence using the phrase "in any election" that establishes the majority requirement and, therefore, that should be accorded greater weight. The better interpretation is that Congress intended "votes cast" to constitute

the votes cast for *any* of the offices up for election at that general election; that is, the number of ballots cast.[5]

Our interpretation is buttressed by a comparison of § 1422 to 48 U.S.C. § 1712, which provides for the election of a delegate from Guam to the United States Congress. *See* 48 U.S.C. § 1712 (1987). In contrast to § 1422, § 1712 expressly requires that a candidate receive "a majority of the votes cast for the office of Delegate." Section 1712 provides in relevant part:

> The Delegate shall be elected at large, by separate ballot and by *a majority of the votes cast for the office of Delegate*. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate.

---

[5] Gutierrez argues that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately 1 million votes that were cast for all candidates for the various offices. The absurdity of this result strongly suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast." However, giving effect to the phrase "in any election" in such a way as to avoid an absurdity is preferable to reading the phrase out of the statute entirely.

Id. (emphasis added). If Congress had intended a gubernatorial slate to require only a majority of the votes cast for governor and lieutenant governor, presumably, it would have used language similar to that used in § 1712. Furthermore, given the fact that § 1422 and § 1712 involve the closely-related subjects of the election of Guam's governor, lieutenant governor, and delegate to Congress, it can be inferred that, by employing such clearly different language, Congress intended to depart from the scheme fashioned in § 1422, when it enacted § 1712 four years later.

In sum, the text of § 1422 and the differences between it and § 1712 make clear that "a majority of the votes cast in any election" means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates.

The parties make a number of additional arguments in support of and against this interpretation. Although these arguments neither compel this interpretation nor call it into question, we address each in turn.

B. Legislative History

Legislative history does not shed much light on the proper interpretation of § 1422. The portion of § 1422 at issue in this case was added in 1968 by the Guam Elective Governor Act. *See* Guam Elective Governor Act, Pub.L.

No. 90-497, 82 Stat. 842 (1968). The House Report accompanying the Act merely summarizes the relevant statutory language without explaining Congress' choice of words. See H.R.Rep. No. 90-1521 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3564.

Gutierrez would have us adopt the construction given § 1422 by the House of Representatives in its adjudication of an election contest for the office of the Guam delegate to the House arising from the Guam general election in 1984. The Guam Election Commission certified Ben Blaz the winner after he received 354 more votes than Antonio Won Pat. *See* H.R.Rep. No. 99-220, at 2 (1985). In doing so, the Election Commission did not include overvotes or undervotes in its tabulation of the majority. Won Pat filed a contest of the election with the House of Representatives in part on the basis that Blaz had not received a "majority of the votes cast" as required by § 1712 because the overvotes and undervotes should have been included. *See id.* at 2, 4. The House dismissed the election contest after concluding that undervotes should not have been included because: (1) under the Guam Election Commission's interpretation of Guam election law, blank ballots deposited in the ballot box should be treated no differently than blank ballots returned to a polling official for cancellation; and (2) the Third Circuit's decision in *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), which held that blank ballots should not be counted in determining a majority in the Virgin Islands gubernatorial election, "enjoys general acceptance in

jurisdictions governed by statutory provisions similar or identical to Guam's." *Id.* at 4.[6]

We reject the argument that the House's resolution of this election contest should guide our interpretation of § 1422. The most important reason for rejecting that election contest as precedent is that, despite the House Report's suggestions to the contrary,[7] § 1712 is drafted very differently than § 1422. As discussed above, § 1712 expressly defines the relevant majority for the election of the Guam delegate: "The Delegate shall be elected at large, by separate ballot and by a majority of the votes cast *for the office of Delegate*." § 1712 (emphasis added). Therefore, § 1712's text clearly excludes undervotes, because such ballots do not cast a vote for this particular office. In contrast, § 1422 requires "a majority of the votes cast *in any election*." § 1422 (emphasis added). At the very least, the text of § 1422 leaves open the possibility that undervotes should be included.

Additionally, we reject the House election contest as precedent in light of established principles of statutory

---

[6] The House of Representatives did not reach the merits of Won Pat's claim that overvotes should have been included because their inclusion would not have changed the result in light of the decision to exclude undervotes. *See* H.R. Rep. 99-220, at 5.

[7] For example, the House Report notes that "[s]imilar Federal statutory language governs the election of Governors and non-voting Delegates from each of the Territories." H.R. Rep. No. 99-220, at 3. The Report also describes *Todman*, which involved a statute identical to § 1422, as addressing "the identical issue" as that posed by the election contest based on § 1712. *Id.* at 4.

construction. First, the election contest came 17 years after Congress enacted the language in question in § 1422. The Supreme Court has cautioned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (internal quotation marks omitted) (citation omitted).

> Such history does not bear strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

Id. at 118 n.13. Second, even if subsequent legislative history is useful and resolution of an election contest qualifies as legislative history, the contest was adjudicated only by the House of Representatives, not the Senate – both of which were required to enact the relevant language in § 1422.

In sum, we find nothing in the legislative history that suggests a different interpretation of § 1422 than that suggested by its text.

C. *The* Todman *Decision*

Gutierrez argues that we should follow the Third Circuit's decision in *Todman*, in interpreting § 1422. In *Todman*, the court held that undervotes should not be counted in determining whether a candidate for governor of the Virgin Islands received a majority of the votes cast

under 48 U.S.C. § 1591. *See* 694 F.2d at 940. The text of § 1591, which provides for the election of the governor and lieutenant governor of the Virgin Islands, is identical to that of § 1422. We respectfully decline to follow *Todman*, however, because it does not provide a more persuasive interpretation of the relevant statutory language than that gleaned from our own textual analysis of § 1422.

Todman's discussion of the merits embraced the reasoning of a decision by the District Court of the Virgin Islands:

> In reaching this conclusion, we note that in *Euwema v. Todman*, [323 F. Supp. 167 (D.V.I. 1971)], Judge Almeric Christian stated that "the proper basis for computing a majority" was that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." We agree with this statement of the law.

Todman, 694 F.2d at 941. Despite this language, however, we note that *Euwema* does not compel the result reached in *Todman*. There were two issues in *Euwema*: (1) whether a referendum on whether to lower the voting age in the Virgin Islands was a special election or part of the general election held the same day, *see* 323 F. Supp. at 168-169; and (2) whether the phrase "a majority of the qualified voters in the Virgin Islands" meant a majority of the citizens qualified to vote or a majority of the citizens who actually voted, *id.* at 169, 171. The first issue was important because there was a discrepancy between the relevant federal statute and the Virgin Islands statute as to

whether the required majority was of the votes cast only on the referendum or of the votes cast at the entire *general* election. In deciding that the Virgin Islands statute was void to the extent that it conflicted with the federal statute, the court characterized as settled law the principle that, for *general* elections, a "proposition is not carried by a majority of the votes cast therefor unless such majority is also a majority of all votes cast at the election." *Id.* at 170 (citing authorities from a number of states) (internal quotation marks omitted) (citations omitted). Because the referendum in question was found not to be part of the general election, this general rule did not apply. *See id.* at 170-71.

The language cited by *Todman* was taken from *Euwema*'s discussion of the second issue: whether "a majority of the qualified voters" meant a majority of the citizens of the Virgin Islands qualified to vote or a majority of the citizens who actually voted. The *Euwema* court came to the unremarkable conclusion that qualified voters who fail to go to the polls are not included in the base count in determining whether the referendum received a majority:

> In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result. . . . [A]lthough there are cases that point to a contrary conclusion, generally the term "qualified voter" in a provision as to the proportion of voters necessary for the adoption of a measure refers, not to

> those qualified and entitled to vote, but to those qualified and actually voting.

Euwema, 323 F. Supp. at 171 (quoting what is now 26 Am.Jur.2d Elections § 406 (1996)).

We, therefore, draw a different conclusion from *Euwema* than did the *Todman* court – that ballot propositions that require a majority of the votes cast and are part of a general rather than a special election typically require a majority of all votes cast at the general election – not just the votes cast on the particular initiative.[8]

D. Case Law at the Time of § 1422's Enactment

Gutierrez contends that § 1422's interpretation is governed by *County of Cass v. Johnston*, 95 U.S. 360 (1877), which, Gutierrez argues, stands for the proposition that voters who do not express a preference in a particular race defer to the choice of those who do:

> This we understand to be the established rule as to the effect of elections, in the absence of any

---

[8] Furthermore, despite the House of Representatives' assertion to the contrary, *see* H.R. Rep. No. 99-220, at 4, there is no indication that *Todman* has gained general acceptance in other jurisdictions. *Todman* has been cited in only three cases, only one of which actually relied on *Todman* instead of on the underlying district court opinion, which *Todman* reversed on other grounds. *See Stapleton v. Board of Elections*, 821 F.2d 191, 193 (3d Cir. 1987) (discussing district court case); *Democratic Party of the Virgin Islands v. Board of Elections*, 649 F. Supp. 1549, 1551-52 (D. V.I. 1986) (same); *Republican Party of Hawaii v. Waihee*, 709 P.2d 980, 981 (Haw. 1985) (noting *Todman*'s holding that blank ballots are not "votes cast").

> statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

Id. at 369. *Cass*, however, is not as expansive as Gutierrez contends and is not controlling for the same reasons that we do not find the *Todman* court's reliance on this language persuasive.[9] First, *Cass* addresses the issue of whether qualified voters who do not go to the polls should be included when calculating a majority. *See id.* at 365. Qualified voters who did not participate in the Guam election are not at issue in this case. Second, *Cass* expressly notes that this principle applies only in the absence of a statutory provision to the contrary. *See id.* at 369. As discussed above, we believe that § 1422 provides such direction.

Ada points to state court decisions interpreting language similar to that used in § 1422 as requiring a majority of all votes cast at an election. For example,

> [i]t is the general rule that when a proposition is required to carry by a majority *of the votes cast* at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the votes on a particular question. California has been classed among the majority holding to this construction.

---

[9] This language is virtually identical to that quoted in *Todman*, 694 F.2d at 941, and *Euwema*, 323 F. Supp. at 171.

People ex rel. Charles T. Smith v. City of Woodlake, 41 Cal.App.2d 119, 122-23 (Cal. Ct. App. 1940).[10]

Ada argues that this case law is relevant because we should assume that Congress acted against the background of these judicial interpretations when it enacted § 1422. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meanings of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word. . . . "); *Miller v. Commissioner of Internal Revenue*, 836 F.2d 1274, 1282 (10th Cir. 1988) ("[W]hen Congress uses a term of art which has received a consistent judicial interpretation, there is a heavy presumption that Congress and the President have incorporated the prior meaning.").

We find these state law cases to be of limited value. Not only did many of the cases predate the enactment of § 1422 by a number of years, but each turns on the specific language of the governing statutory provision in

---

[10] *See also City of Santa Rosa v. Bower*, 142 Cal. 299, 301-02 (Cal. 1904) (requiring "a majority of . . . qualified electors voting thereat"); *People v. West Side County Water Dist.*, 112 Cal.App.2d 228, 231-33 (Cal. Ct. App. 1952) (requiring "a majority of the votes cast at the election"). The Supreme Court of Nebraska reached the same conclusion after an extensive analysis of case law from other jurisdictions. *See Thurston County Farm Bureau v. Thurston County*, 287 N.W. 180, 185-88 (Neb. 1939). The *Thurston County* court went so far as to conclude, "[t]he rule announced in these decisions is too firmly established to be further questioned in this state." *Id.* at 188.

question. Furthermore, a number of cases reach a different result.[11] Therefore, these cases do not establish a rule that is equivalent to a term of art encapsulating well-established judicial precedent such that Congress surely must have intended to incorporate its meaning when it enacted § 1422; these cases support our interpretation of § 1422, but do not compel it.

E. Guam Election Law

Gutierrez argues that Guam election law precludes the inclusion of undervotes and overvotes in the computation of the votes cast because 3 Guam Code Ann. § 11114 provides that ballots for which it is impossible to determine the voter's choice should not be counted in the race for that office. Section 11114 states that, in the event that a voter indicates

> the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice

---

[11] For example, in *Alaska Native Ass'n of Oregon v. Morton*, 417 F. Supp. 459 (D.D.C. 1974), the court noted that "a majority is determined on the basis of those voting on the particular proposition on the ballot, not on the number of ballots cast." *Id.* at 468. Similarly, in *Munce v. O'Hara*, 16 A.2d 532 (Pa. 1940), the Supreme Court of Pennsylvania adhered to "what we regard as the better view" that "a majority vote of [a town's] qualified electors cast at any general election" refers to the votes cast on the proposition in question, not on other questions or for candidates for office. *Id.* at 532, 533. *See also Wooley v. Sterrett*, 387 S.W.2d 734, 740 (Tex. Civ. App. 1965) (following rule enunciated in *Munce*); *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89, 98 (Haw. 1997) (holding that "a majority of the ballots cast upon such a question" includes blank ballots and overvotes).

> for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.

3 Guam Code Ann. § 11114 (1998). Section 11114, however, establishes only that invalid votes and blank votes are not counted in favor of any candidate for the office for which they are invalid or blank. It does not preclude those ballots from being counted as "votes cast" for purposes of determining a majority. In fact, § 11114 expressly provides that these ballots are still valid for purposes of other races in the election.[12] We thus conclude that Guam election law does not shed any additional light on the proper interpretation of § 1422.[13]

F. Policy Considerations

Finally, Gutierrez argues that it is nonsensical to require a runoff election when there were only two gubernatorial slates in the election and even more so because Gutierrez would have received a majority of the votes validly cast even if all of the write-in votes had

---

[12] The same is true for 3 Guam Code Ann. § 11111, which provides in relevant part that "[a]t any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved." 3 Guam Code Ann. § 11111 (1998). The fact that a particular vote on a ballot is invalid does not mean that the ballot should not be counted in determining a majority.

[13] Even if Guam election law contradicted our interpretation of § 1422, Guam law would not control because Guam law cannot trump conflicting federal law. *See Euwema*, 323 F. Supp. at 170 (invalidating Virgin Islands election statute to the extent that it contradicted federal election statute).

gone to Ada. There is a good deal of appeal to this contention. The fact that a runoff election seems superfluous in this particular instance, however, does not strip the runoff requirement of all justification. For example, as Ada points out, Congress' purpose in its choice of language in § 1422 may have been to confer on the victors the greater legitimacy of having received more than 50 percent of the votes of all voters participating in the election. Furthermore, Congress obviously was aware of the strong two-party tradition in this country when it adopted § 1422's majority requirement and, therefore, could have predicted that two-slate dominance was a likely occurrence. The argument that a new election will not change the old should be made to Congress and not the courts. Thus, despite the various policy arguments for or against allowing a seemingly indifferent minority to force a runoff, the language Congress chose when it enacted § 1422 requires such a result.

IV.

Section 1422's requirement that a gubernatorial slate secure "a majority of the votes cast in any election" to win is better interpreted as requiring a gubernatorial slate to garner a majority of the votes cast in the general election, rather than only in the gubernatorial race, if we are to give force to the words chosen by Congress. The Guam Election Commission should have included undervotes and overvotes in the total number of votes cast. As a result, the Gutierrez slate failed to secure a majority of the votes cast, necessitating a runoff election between the Gutierrez and Ada slates.

Because the district court did not base its decision on an incorrect legal standard, it did not abuse its discretion in issuing a writ of mandamus. Accordingly, the order of the district court is AFFIRMED and this case is REMANDED to the district court for further proceedings.[14] The emergency stay issued on December 15, 1998, is dissolved.

---

[14] We leave it to the district court, in its discretion and after hearing from the parties, to determine whether it should set the date of the runoff election or require the Guam Election Commission to do so.

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JOSEPH F. ADA, et al., Petitioners, vs. GOVERNMENT OF GUAM, GUAM ELECTION COMMISSION, Respondents, CARL T.C. GUTIERREZ, et al., Real Parties in Interest.	Civil Case No. 98-00066 ORDER & WRIT OF MANDAMUS (Filed Dec. 9, 1998)

This case is before the Court on a Petition for Writ of Mandamus and prayer for Declaratory Relief decreeing that candidates Carl T.C. Gutierrez and Madeleine Bordallo were not elected by a majority of the votes cast, as required by the Organic Act, 48 U.S.C. §1421 *et seq.* The Complaint alleges and prays for other relief, which will not be addressed in this Order.

THE CASE:

The Court accepts as a starting point the undisputed fact that the Election Commission certified the following results: Carl T.C. Gutierrez and Madeleine Bordallo (hereinafter "the Democratic candidates") received 24,250 votes and Joseph F. Ada and Felix P. Camacho (hereinafter "the Republican candidates") received 21,200 votes,

1,294 votes were cast for write-in gubernational candidates, 1,313 votes were cast which did not vote for any gubernational candidates, and 609 votes were cast which voted for both gubernatorial candidates. At the time of certification, though the initially [sic] tally reflected that 48,666 voters cast ballots, the Guam Election Commission changed the total ballots cast to 47,353 (by not counting 1313 ballots on which there was no vote for either candidate) and certified the result on November 16, 1998. The result certified was that the Democratic candidates won the election with 51.21% of the 47,353 votes cast.

The Petition for Writ seeks a ruling that the candidates certified as winners were not elected by a "majority of votes cast" as required by the Organic Act, 48 U.S.C. §1422:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam.

The Petitioner argues that because the total number of votes cast in the gubernatorial election was 48,666, the winner would have to receive a majority, which is more than half of the votes cast. Half of 48,666 is 24,333. Petitioner argues that because the Democratic candidates did not receive at least 24,333 votes, a run-off election must be held under §1422 of the Organic Act:

> If no candidates receive a majority of the votes case [sic] in any election, on the fourteenth day thereafter a runoff election shall be held

between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

The election was held on November 3, 1998. The election results were certified on November 16, 1998.[1] This Petition was filed on December 1, 1998. A scheduling conference was held on December 4, 1998, and the Court

---

[1] The "numbers" were presented to an Election Commission meeting on November 12, 1998. The Guam Election Commission is composed of seven members, three recommended by the Republican party and three recommended by the Democratic party. 3 G.C.A. §2101(a). The six members are supposed to choose the seventh member, but this had apparently not happened because during the time period involved in this case, there were only six members of the Election Commission. The Chairperson is chosen annually by the remaining members. 3 G.C.A. §2101(c).

From the time period of November 3, 1998 (the date of the election) to November 12, there were only two remaining representatives of the Republican party on the Commission because one was absent from the island for unexplained reasons. On November 12, 1998, the returning Republican member appeared to the astonishment of her Republican colleagues but voted against certifying the winners of the election. On November 16, 1998, a meeting was scheduled for noon. It was canceled by Joe Mesa, the Chairperson, on request, shortly before the meeting. Notice of the cancellation was disseminated to the press and public. However, unbeknownst to spectators, press and public, the meeting was nonetheless called by Democratic member Horecky as an "emergency" meeting even though reportedly canceled. Joe Mesa did not attend because he had himself canceled the meeting as Chairperson of the commission and the emergency meeting apparently was not reported to him. The remaining members quickly put the issue of election certification before the members present. The three Democratic members and the returning Republican member declared the Democratic candidates to be the winners.

modified its December 2, 1998 briefing schedule to allow briefs to be longer in length and to be submitted by 5 p.m. on December 4, 1998 and for supplemental briefs due on December 7, 1998.[2] At the hearing an oral motion was made by Respondents Gutierrez and Bordallo for the Court to recuse itself. The Court denied the motion orally at the December 9, 1998 hearing and incorporates its ruling herein by reference.[3]

I. ABSTENTION:

Respondents assert that this is a proper case for abstention. Abstention is a "extraordinary and narrow

---

[2] Defendants Gutierrez and Bordallo objected to the Court's briefing schedule set on shortened notice. The Court overrules their footnoted continuing objection on several grounds. First, this lawsuit comes as no surprise given the storm of publicity resulting from the difficulties encountered in the tabulation of votes and the certification of the results by the Guam Election Commission. In fact, the counsel for the Guam Election Commission had already been researching the Organic Act issue presented in this lawsuit. And, there is evidence that counsel for the Democratic candidates had been involved in this matter since difficulties were encounters [sic] with certification. Second, the Court did make allowances for counsel to adequately research and brief the matters presented herein. Briefly stated, counsel were allowed longer briefs and an opportunity to supplement their original briefs after additional time to perform research and after exchange of the initial briefs. Finally, the page limit for briefs did not include attachments to the briefs. Third, this matter needs to be resolved quickly before additional actions are taken which may further complicate matters, such as but not limited to, the swearing in of the Democratic candidates.

[3] A copy of the Court's oral ruling is appended hereto.

exception to the duty of a district court to adjudicate a controversy properly before it." There are two different abstention doctrines invoked here, "*Younger* Abstention" and "*Colorado River*" abstention. "*Younger* Abstention" is primarily interested in comity. *Younger v. Harris*, 401 U.S. 37 (1971). The cases involving *Younger* are primarily concerned with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. *Id.* at 44. Abstention under *Younger* is appropriate only where a court can answer all of the following questions affirmatively: "first, do the [relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982).

At the time of filing, there was no ongoing state proceeding, thus *Younger* abstention is inapplicable. For the purposes of determining whether a state proceeding is "ongoing" the courts often look to the date of filing. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). As of the time of the filing of this case, there was no ongoing process in the local court. The suits were filed on the same date in both federal and local court (the local suit was filed an hour and a half after this case was filed). The federal court has begun proceedings on the interpretation of a federal question. The local court has not proceeded; it was conceded at oral argument that as of the time of oral argument, the case had not yet been assigned to a Superior Court judge. As of late in the day Monday,

December 7, after this Court's hearing, the case was assigned to a judge.[4] A scheduling meeting has been scheduled for approximately five hours from now. The local case focuses on interpretation of local law and allegations of voting irregularity, not the federal question. Therefore, the first question is answered in the negative. The court need not go further to determine that *Younger* abstention is improper.

The second prong is not as clearly in favor of local interest as it might appear. It cannot be doubted that a local election implicates local interest. However, it cannot be doubted that when a federal court limits itself to interpreting a statute of Congress, overriding federal interests are implicated as well. The Court purposefully limits the scope of its analysis at this time out of respect for territorial interests. Therefore, at this time, the second prong of *Younger* does not favor respondents.

However, it must be noted that the third prong of the *Younger* analysis is also answered in the negative. There is no guarantee that constitutional questions would or could come to light in local court. There is no guarantee that this Organic Act question would be answered or that the local court will not be challenged as to its jurisdiction to decide the Organic Act question. There are numerous procedural barriers that could be set forth. However, at this time, no opportunity to air constitutional concerns

---

[4] It should be noted that the entire Supreme Court of Guam was appointed by the Real Parties in Interest, and all of the judges of the Superior Court were appointed either by the Real Parties in Interest or by Petitioner Ada in his prior administration.

has been provided. This court is now in a position to do so and would be remiss to rule otherwise.

Colorado River abstention arises out of an interest to avoid the duplication of litigation. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). It derives, not out of comity, but out of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 817. Here, there is absolutely no duplication of litigation. This case has barely proceeded past filing in local court. In contrast, this court has analyzed the complaint, determined the federal issue presented, received specific briefing on the dispositive issue, has held a hearing and is prepared to rule. Abstention would be most improper at this time.

The abstention doctrine discussed herein does not ask a federal court to abstain from every election dispute. In some cases, it is appropriate to exercise jurisdiction in local election cases. The case of *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) is instructive in this regard. In that case, the federal court was not made to abstain in the face of simultaneous local court proceedings on the local election. The wholesale fraud in the election rendered federal court involvement appropriate; "a federal plaintiff may pursue parallel actions in the state and federal courts so long as the plaintiff does not seek relief in the federal court that would interfere with the state judicial process." *Marks v. Stinson* at 884. At this time, the Court confines its ruling on the Organic Act issue. Such a limited ruling will not interfere with the local judicial process. As elucidated *infra*, this Court defers ruling on the allegations of wholesale fraud in this election at this time, preferring to take

them up if the local apparatus proves unable to address the allegations. *See* note 5.

Most importantly, however, distinguishing this Guam election from the typical state election is the fact that in the usual state election, there is no federal statute in issue. The local interest is strong in this case, but federal interest counterweighs that interest in the need to consistently interpret a federal statute, the Organic Act. In contrast, the companion case in local court is primarily concerned with Guam Election Law. The local interest in the outcome of its election is powerful. But the local interest in interpreting a federal statute cannot be more compelling than that of the federal court interpreting a federal statute.

II. WRIT JURISDICTION:

This court may provide relief in the form of a writ of mandamus. The All Writs Act states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of the law." 28 U.S.C. §1651. Judicial power under the All Writs Act is properly invoked only in extreme or extraordinary circumstances. *Clark v. Busey*, 959 F.2d 808 (9th Cir. 1992); *California Energy Commission v. Johnson*, 767 F.2d 631 (9th Cir. 1985) (injunctive relief under the All Writs Act was unavailable where irreparable harm showing was found to be speculative). In order for a court to entertain a request for issuance of mandamus, it must possess an independent source of jurisdiction. *Lights of America, Inc., v. United States District Court*

for Central District of California, 130 F.3d 1369 (9th Cir. 1997). The provision in question states:

> If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. §1422. This court possesses an independent source of jurisdiction because the question before the court is a federal question regarding the interpretation of a federal statute, specifically, "Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress," the Organic Act of Guam, 48 U.S.C. §1422. The question before the court is whether a majority of the votes cast went to any one candidate. Therefore the question is federal in nature, requiring the interpretation of a federal statute. Thus the court has within its jurisdiction the ability to provide relief in the form of a writ of mandamus.

Mandamus relief is the proper remedy in cases where an election commission has already certified the results, thus leaving nothing to enjoin. *Democratic Party of the Virgin Islands v. Board of Elections, St. Thomas-St. John*, 649 F.Supp. 1549 (D. V.I. 1986) (writ of mandamus issued). Mandamus had been found to lie in a court with jurisdiction on behalf of a candidate for office to compel a runoff between himself and the candidate receiving a plurality of the vote where an election officer's failure to order a runoff violated a duty imposed by law, and no adequate remedy at law existed. *Estrada v. Adame*, 951 S.W.2d 165 (Tex. App. 1997) (a "majority" voting case under Article

II, §11, of Texas Constitution). Mandamus will lie in order to expunge a decision which an election board lacks the jurisdiction to enter. *Johnson v. Theis*, 669 N.E. 2d 590 (Ill. App. Ct. 1996). "Mandamus is only available when (1) plaintiff's claim is clear and certain; (2) duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Leon Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998). This case is proper for consideration for a writ of mandamus. It involves a complaint lodged after the issuance of a certification by an election commission. Petitioner's claim is clear and certain; it asks for this court to interpret the term "majority of the votes cast." The duty upon the election commission is ministerial in nature, as it does not permit certification absent the majority set forth above. Finally, there is no other adequate recourse for complainants to receive interpretation of a federal statute. For all of these reasons, issuance of a writ of mandamus may be secured from this court.

At this time, the Court will restrict its order to the sole issue of the Organic Act interpretation. Federal courts generally have a very limited place in election disputes because the court system and the party machinery of a state are presumed to be the better apparatus for litigating such disputes. However, a significant exception exists to this principle.[5] Federally protected rights are

---

[5] Federal law is replete with cases involving federal court involvement with local elections in extreme circumstances. Where the state's school board refused to follow Supreme Court pronouncements, federal district courts may issue injunctive relief against state machinery to effectuate the purposes of the Supreme Court. *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958)

implicated when the entire election process, including the state's administrative and judicial corrective process, fails on its face to afford fundamental fairness. *Pearl v. Leahy*, 1988 WL 168561 (S.D.Fla. 1988). The case of *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986) reiterated that there can be "patterns of state actions that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote," over which federal courts may exercise jurisdiction. *See also Thompson v. Woodall*, 819 F.2d 1052 (11th Cir. 1987). Though the Court now restricts this ruling to the isolated issue of interpretation of the Organic Act, the Court defers rather than rejects ruling on the other aspects of the election. If the territory's administrative and judicial corrective process timely and sufficiently addresses other questions and discrepancies of the election, thereby affording fundamental fairness to the voters of this territory, further intervention of a federal court should not prove necessary. If it does not, then,

---

(school busing). In other cases, federal courts have acted in the absence of action from other quarters. In *Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993), the Eleventh Circuit held that a district court could intervene in a local election matter when it appeared that the local courts would not do so in a timely or efficient fashion. "Once it is apparent that a state court, through no fault of the district court, will not develop a redistricting plan in time for an upcoming election, Growe [*Growe v. Emison*, 507 U.S. 25 (1993)] authorizes a federal district court to go ahead and develop a redistricting plan." Further, the federal court's pronouncement is thereafter of *res judicata* effect. *Wesch* 6 F.3d at 1473. Finally, the case of *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), reminds us that if the election process itself reaches the point of patent and fundamental unfairness, "a federal role is appropriate." *Griffin* 570 F.2d at 1077.

this Court will intervene. It should be noted, however, that this Court's ruling on the issue of the interpretation of the Organic Act has *res judicata* effect. *See* note 5.

Respondent Horecky argues that 28 U.S.C. §1361[6] limits the issuance of mandamus under §1651 to only federal employees. This is incorrect. This section was intended only to ease the burden of proceeding against officers and employees of the federal government who previously were only amendable [sic] to suit in the District of Columbia. *Jarrett v. Resor*, 426 F.2d 213 (9th Cir. 1970). it simply allowed all federal courts to issue mandamus rather than only the District Court for the District of Columbia, and did nothing to minimize the power of district courts to issue mandamus in other contexts.

Respondent Horecky goes on to state that "[a] federal district court has no general mandamus jurisdiction to compel action by state officials," citing *Bermudez v. Chargualaf*, Civil Case No. 97-00023 (Order May 20, 1997) (D. Guam) for this proposition. This is a misreading of that case. In *Chargualaf* this court rejected a request for mandamus under 28 U.S.C. §1361 precisely because Bermudez sought relief against territorial officials, not federal officials. Thus, it was improperly asserted. Here, no one is asserting §1361 as a basis. Furthermore, this case is

---

[6] 28 U.S.C. §1361 reads:

> Action to compel an officer of the United States to perform his duty. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

within this court's jurisdiction to issue mandamus because it is a federal question based on the interpretation of a federal statute. It clearly lays within the Court's powers to issue writs under 28 U.S.C. §1651.

Next, Respondent Horecky argues that plaintiffs have an adequate means, such as direct appeal, to attain the relief desired, citing *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, 94 F.3d 1346 (9th Cir. 1996).[7] Under the All Writs Act, the party seeking relief must have no other adequate remedy available. Respondent Horecky has stated that since the plaintiffs could have also sought mandamus in Superior Court, this is an "adequate means, such as direct appeal," available to them, thus divesting this court of jurisdiction. Notwithstanding the three-part analysis necessary, his assertion is legally untenable. As this court has stated, *supra*, mandamus is only to be used in extraordinary circumstances. It is to be used when direct appeal is unavailable. The suggestion of the use of mandamus on the local level is a concession that no direct appeal is available. Thus, this serves as an endorsement of the court's use of its mandamus power. Finally, nothing in the three-part *Younger* analysis precludes the federal court from exercising its lawful authority just because similar power may be vested in another court.

---

[7] However, the *Apusento Gardens* case addresses the writ jurisdiction that this court exercised when it was the appellate court for the Superior Court of Guam under §1424-3 of Title 28. (Because there is a sitting Supreme Court of Guam, this Court no longer exercises appellate jurisdiction; *Apusento Gardens*, addressed this Court's appellate jurisdiction only.)

III. FOURTEEN DAY ISSUE:

Respondent Horecky argues incorrectly and illogically that this Court lacks jurisdiction because it is fourteen days past the election. Under 48 U.S.C. §1422 a "runoff" election shall be held on the fourteenth day after the election if a majority is not secured. He reasons that since it is now past November 17, 1998, this Court is divested of jurisdiction. This argument is totally unpersuasive. It was the Guam Election Commission which delayed certification for fourteen days. The fourteen days is not an obligation imposed on anyone but the Guam Election Commission. Until such time that the certification issue was finally decided upon, the issue was unripe and thus would not have been properly before this Court. Indeed, it is absurd to argue that Congress intended for the jurisdiction of this Court to be placed in the hands of a local election commission.

The plain meaning of the statute must surely be that, automatically, when a majority is not found, the Guam Election Commission shall conduct an election in fourteen days. This Court's view is in complete agreement with the court in *Estrada v. Adame*, 951 S.W.2d 165 (Tex. App. 1997), where the court issued mandamus for a runoff election though the complaint was filed eight days after the election, and though the pertinent statute directed that runoff shall be had five days after the election. The court saw no impediment, or duty upon anyone but the Texas election commission, and ordered the new election within thirty days. *Id.*

The Court declines to accept the "mechanical" reading of the Organic Act propounded by Respondent

Horecky. Theoretically, taken to its extreme, partisan members of the Guam Election Commission could intentionally delay certification of the election until the fifteenth day after the election and then claim that any contest was too late. Surely the law was not intended to operate in this most unfair way.

Respondent Horecky's argument for waiver is similarly weak and uncompelling. He asserts that the failure to sue in fourteen days constitutes waiver and then goes further to argue that Petitioners failed to pursue administrative remedies. This argument is completely circular. There is no administrative remedy to be had. As Respondent Horecky in the same brief later states, the commission has no authority to investigate the legality of votes.[8] Furthermore, the "majority" issue had already been decided by certification. Therefore, the administrative process was complete.

---

[8] The Court does not agree with this assertion. *See* 3 G.C.A. §2106, granting the Guam Election Commission significant powers:

> §2106. Same: Powers of Commission. The Commission shall have the power to summon the parties to a controversy pending before it, issue subpoenas duces tecum and otherwise to take testimony in any investigation or hearing pending before it and delegate such power to any officer. Any controversy submitted to the Commission shall be tried, heard and decided within fifteen (15) days counted from the time the corresponding petition giving rise to said controversy is filed. The Commission shall have the power to certify to the Superior Court of Guam for contempt.

IV. THE "MAJORITY" ISSUE UNDER THE ORGANIC ACT:

The central question is whether a runoff is required under the Organic Act because a candidate did not receive the requisite majority. Counting all ballots cast as noted by the election commission, the Democratic candidates did not receive a majority. However, the record shows that the election results were certified on the basis of Guam Election Commission Legal Counsel's legal opinion that the Election Commission should not count the "blank" ballots, that is, ballots which did not mark either the Democratic candidates or the Republican candidates. If the blank ballots are not counted, the total number of votes cast goes down to 47,353, and the 24,250 votes received by the Democratic candidates is a majority, justifying the certification by the Election Commission of the results. It should be noted that in two prior elections, the blank ballots were counted in the total number of votes cast.

The issue is whether the Election Commission should have counted or not counted the blank ballots. If they are to be counted, a run-off would be required. If they are not to be counted, not taking into account the other irregularities of the election, the Democratic candidates would have been properly declared winners of the election.

A. Guam Election Statutes:

Real Parties in Interest's first argument is that Guam election statutes address the casting of blank ballots and resort to other law is not necessary. The Court must

evaluate whether local law answers the Organic Act question whether blank votes should be counted. The Court finds such an analysis helpful but not binding on the interpretation of federal law.

First, opponents cite 3 G.C.A. §9135, "Indicating Vote," which provides:

> In voting, the voter shall place the appropriate mark in the voting square adjacent to the name of any nominee for whom he intends to vote or shall vote for a candidate or person whose name is not printed on the ballot by writing a name for that office in the blank space left therefor, and by placing a mark in the adjacent voting square.

But the Court finds that this statute only tells one how to vote. It does not tell the voter, or the Election Commission, that if he does not fill in a blank as indicated that ballot will be void (as in *City of Inglewood, infra*). It does not say anything about improper intent. It does not address overvoting (more than one candidate), undervoting (no candidate), the legal effect thereof, or the disposition of the ballot.

Petitioners' opponents next refer to 3 G.C.A. §9145, "Cancellation of Ballot Received but Not Voted," which provides:

> Every voter who does not vote the ballot delivered to him shall, before leaving the polling place, return it to the member of the precinct board having charge of the ballots who shall immediately cancel and return it in the same manner as spoiled ballots.

Again, the Court finds that this does not address whether the Election Commission should count blank ballots. This merely instructs a voter that if he does not intend to vote, he is to return the ballot to the precinct worker. The act of placing the ballot in the ballot box distinguishes this voter from the non-voter, who merely returns the ballot. This section is of no assistance to Real Parties in Interest, but supports a view that a ballot placed in a ballot box, not otherwise void, has a legal effect.

Respondents cite §11111 of Title 3 G.C.A.:

> §11111. Imperfectly Marked Ballots Void. At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.

This context of this law clearly shows that this section addresses whether to count a ballot which is imperfectly marked, not marked well, or marked by the handicapped or infirm voter such as a voter with Parkinson's disease.

Respondents' and Real Parties in Interest's argument under this statue is appealing, but proponents have failed to direct the Court to any provision clearly addressing overvoting and undervoting, though these terms are familiar to all election commissions. Surely, if intended to be of no legal effect, all ambiguity could have been removed by the use of such terms. For example, the Code anticipates the use of distinguishing marks on a ballot, and explicitly invalidates such ballots. No similar code provision exists for overvotes or undervotes and none

shall be read in by this Court when the local legislature has seemingly covered the field.

There is no indication that this statue should be interpreted for the larger issue of overvoting and undervoting. Further, the ordinance containing voting instructions in the *City of Englewood* case, *infra*, was specifically addressed to the voter and explained to the voter directly the legal consequences of this act.

The Court in finding that the Election Commission operated outside of its jurisdiction looks to 3 G.C.A. §11136, which states:

> Review of Ballots. The Commission shall not review any ballots except as permitted on a recount.

Here, the record of the Guam Election Commission proceedings clearly shows that this Commission acted not in a ministerial capacity but in an adjudicative capacity in violation of 3 G.C.A. §11136 when it re-classified votes that had been included in the totals as votes that were void for all purposes. This Court will not permit such action.

Respondent Horecky cites *City of Englewood v. Kew*, 132 P. 780 (Cal. 1913) for the proposition that if a ballot is not expressive of a wish, which under the law, can be given effect, such person has not voted. *Accord Covina Union High School District v. McClellan*, 228 P. 409 (Cal.App. 1924). However, this is an overbroad reading. *Kew* and *McClellan* were bond issue cases. In *Kew*, an ordinance was passed setting forth the time, place, and manner of election. *Kew*, 132 P. at 781. It included instructions therein to voters: "To vote for a proposition stamp a

cross in the blank or voting square. . . . All marks except the cross are forbidden. All distinguishing marks or erasures are forbidden and make the ballot void." *Id.* at 782. (Emphasis added). The specific directions of the ordinance have a mandatory effect, and a disregard thereof renders the vote nugatory. *Murphy v. San Luis Obispo*, 51 P. 1085 (Cal. 1898). Here, we have no such mandatory clause. Under 3 G.C.A. §9135, a "voter shall place the appropriate mark in the voting square adjacent to the name of any nominee for whom he intends to vote . . . ". Note that there are no legal consequences indicated. There is no direction under the laws of Guam removing meaning from the vote. Therefore the local statute does not foreclose giving effect to a blank ballot or overvoted ballot as it may reflect the intent of the voter.

B. Case Law:

The Guam Election Commission relief on the case of *Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). In that case, the Third Circuit entertained immediate appeal of the District Court of the Virgin Islands order requiring a run-off election for Governor and Lieutenant Governor. In *Todman*, the Third Circuit reversed the District Court of the Virgin Islands and held that in determining whether the apparent winners received a majority, it was not proper to count blank ballots or ballots that were blank as to Governor and Lieutenant Governor. In so holding, the Third Circuit relied on a Virgin Islands District Court case, quoting from it the long standing holding that voters not attending the election are deemed to have

acquiesced to the will of the voting majority.[9] The case relied upon, however, is not so clear on this issue.

The Third Circuit in *Todman v. Boschulte* took its short holding directly from the Virgin Islands district court case of *Euwema v. Todman*, 323 F.Supp. 167 (D.V.I. 1971), but a closer examination of *Euwema* reveals surprising inconsistencies which compel this Court to reject *Todman* as precedent. The issue in *Euwema* involved a referendum: Congress had amended the Virgin Islands' Organic

---

[9] It is not argued that the majority must be comprised of all qualified electors, as has been argued in other election cases. This is well settled: one who fails to vote cannot be counted in determining the majority requirement:

> It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. But the majority of those who actively participate in the affairs of state and not of the entire body of voters, controls. Elections must be settled as a practical matter by those manifesting interest enough to vote. Failure on the part of some of the electorate to take the trouble to express their views by depositing their ballots cannot stop the machinery of government. Apathy is not the equivalent of open opposition. It is the nature of our institutions that the majority of those who vote must accomplish the avowed purpose of all elections." *Cashman v. Entwistle*, 100 N.E. 58 (Mass. 1912).

See Heuchert v. State Harness Racing Commission, 170 A.2d 332 (Pa. 1961). This does not address, however, whether one's blank vote is counted, which is at issue in this Order. The Court rejects Respondent's argument that *County of Cass v. Johnston*, 95 U.S 360 (1877), makes clear that one does not distinguish between one who does not go to the polls and one who goes and casts a blank ballot.

Act, 48 U.S.C. §1542, "Voting franchise; discrimination prohibited" in 1970 by adding subsection (b) which allowed the voters of the Virgin Islands to lower the voting age from 21 to 18 by approving it in a referendum "held for that purpose." Thus, the election at issue in *Euwema* was a special election by law. However, the ballot on lowering the voting age was presented to the electorate in the general election, though on a separate ballot. The issue was whether a majority of those voting *on the referendum* would be required to pass the referendum, or those voting *in the general election*. The District Court prefaced its opinion with the statement: "[t]he question presented here is not . . . whether a blank ballot should be tallied as an affirmative or a negative vote on a given proposition." *Id.* [emphasis added]. The issue was which majority to use in tallying the results of the referendum only. In deciding the case, the Virgin Islands district court acknowledged cases from other jurisdictions, stating that "despite one or two holdings to the contrary, it is settled law that 'the proposition is not carried by a majority of votes cast unless such majority is also a majority of all votes cast at the election,' " quoting 26 Am.Jur.2d §311, *Thurston County Farm Bureau v. Thurston county*, 287 N.W. 180 (Neb. 1939), *Stembridge v. Newton*, 99 S.E.2d 133 (Ga. 1957), *Allen v. Burkhart*, 377 P.2d 821 (Ok. 1963), and *State ex rel. Blankenship v. Gaines*, 241 P. 12 (Wash. 1925). However, the district court distinguished those cases from the voting age referendum before it by referring to the Congressional measure which allowed the vote in the first place: the measure unequivocally dictated that the voting age referendum be presented to the people in a *special*

election: "in a referendum election held for that purpose." It was not supposed to have been presented to the electorate in a general election. Because of this factor alone, the District Court of the Virgin Islands held that it had authority to sever the special election from the general election. Therefore, the court was at liberty to deviate from the principle that all votes cast must be counted. A special election was by necessity deemed held inside a general election. In holding that a majority had passed the measure, the Virgin Islands District Court enunciated the principle that it would not consider the votes of those who did not submit a ballot, stating that voters "not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting." This merely reiterates the long-standing principle that a majority vote requirement does not require the entire electorate, but only those voting (*see* note 9). The Virgin Islands district court in that case did *not* hold that blank ballots should not be counted. It held that it would count only those ballots cast by the voters participating in the so-called special election. But *Euwema* means, by implication, that if the question had been a part of the general election, all votes would have to be used to calculate the majority, not just the votes cast on the proposition at issue.

Yet, from this statement, the Third Circuit in *Todman* interpreted that the Virgin Islands District Court held that blank ballots were not to be counted. However, this is obviously not the holding of the *Euwema* case. It was not even the issue in the *Euwema* case. The *Todman v. Boschulte* case rests on most insecure footings.

Aside from the fact that the Virgin Islands case upon which the Guam Election Commission relied on in certifying the results rests on a most shaky foundation, the Court is also very reluctant to align this territory with a region that has suffered a long history of contested elections. The Virgin Islands suffers a disturbing history of election disputes. *See Brown v. Hansen*, 973 F.2d 1118 (3rd Cir. 1992), *Stapleton v. Board of Elections, St. Thomas-St. John*, 821 F.2d 191 (3rd Cir. 1987), *Markoe v. Legislature of the Virgin Islands*, 592 F.2d 188 (3rd Cir. 1979), *Williams v. Todman*, 367 F.2d 1009 (3rd Cir. 1966), *Canton v. Todman*, 367 F.2d 1005 (3rd Cir. 1966). To Guam's pride, elections have historically proceeded with civility in this territory, lacking significant history of election contest. The fact that one election has emerged with problems remains to Guam's credit, that there is no extensive history to draw upon. The history of Virgin Islands election contest cases is not one that is attractive for this Court to rely upon.

Most importantly, as initially appealing as it is to look to a fellow territory for law, especially a case which interprets a similar or identical Organic Act provision, it is unnecessary because there is persuasive authority for this territory closer to home. The Court initially looks at the case of *People ex rel. Smith v. City of Woodlake*, 106 P.2d 71 (Cal.App. 1940), where a California court of appeals addressed this issue squarely, holding that the phrase "majority of the votes cast" meant that even abstentions must be counted if a ballot is submitted. In that case, in an election on whether a municipality could be incorporated, 171 ballots were cast in favor of incorporation, 163 ballots were cast against, and 9 ballots were cast which expressed no choice on incorporation, but cast votes on

the other matters presented on the same ballot. It was held that "it is the general rule that when a proposition is required to carry by a majority of votes cast at a certain election the proposition must receive the favorable vote of a majority of all votes cast." The court held that because 343 votes were cast, the majority would have to earn half of 343, or 171.5. (A majority is not 50% plus one, it is simply more than 50%. As long as more than half the number of voters is earned, a majority is earned. *Pruitt v. Zbranck*, 722 S.W.2d 142 (Tex.App. 1986) (holding that it was not necessary that the candidate receive at least one whole vote in excess of half the number of votes cast)).

The *City of Woodlake* case relied on *People ex rel. Wells v. Town of Berkeley*, 36 P. 591 (Cal. 1894), which held that the term, "majority of electors voting at a general election" was to be taken literally – that all voters' votes are counted in determining a majority. In so holding, the California Supreme Court reasoned that "these words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required." This case was followed by the California Supreme Court again in the case of *City of Santa Rosa v. Bower*, 75 P. 829 (Cal. 1904), a case which held that if a question is presented to the electorate at a general election, to find a majority of those voting, all voters' ballots must be considered. And, in *Law v. City and County of San Francisco*, 77 P. 1014 (Cal. 1904), the Supreme Court of California yet again affirmed the principles in *City of Woodlake*.

More recently, the case of *People ex rel. Rowe v. West Side County Water District*, 246 P. 2d 119 (Cal.App. 1952),

the California appellate court declined to conclude that the measure before the voters passed because of 490 votes, 242 were in favor, 241 against, with seven abstentions. The court ruled that the winner would have to have earned 245 votes because all 490 votes would be considered. The Court said simply, "if the legislature had intended to authorize the formation of a county water district upon a favorable majority of the votes on the proposition rather than upon a favorable majority of the votes cast at the election it would have been a very simple matter to say so in concise terms."

With authority in our backyard, it is questionable whether resort to Virgin Islands law is necessary. The Court's predisposition to California law is well rooted in Guam law: "This Court has recognized that where Guam law is unclear, California cases 'are persuasive.' *Roberto v. Aguon*, 519 F.2d 754 (9th Cir. 1975), *See Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979)," *People of the Territory of Guam v. Borja*, 732 F.2d 733, 735 (9th Cir. 1984).[10] Most important is the fact that these very California cases were available to those involved with the passage of the Organic Act measure in question. These cases were on the

---

[10] This principle had its origin in the case of *United States v. Johnson*, 181 F.2d 577 (9th Cir. 1950), which held that "when the appropriate authority adopted form California a code of laws designed to replace the original part-Spanish law, it might be inferred that such codified rules . . . were intended to have the same significance and scope as they had been given by the Supreme Court of the State from which the code was taken." *Id.* at 580. In this case, we do not have a California Supreme Court pronouncement on an identical statute, we have a California Supreme Court pronouncement on identical language, "majority of votes cast."

books in 1950 when §1422 was enacted by the United States Congress, and anyone would have known exactly what the term "majority of votes cast" meant by resort to the case law as it existed at that time. As noted by counsel for Real Parties in Interest, Congress is deemed to have followed relevant statutory interpretations rendered before a statute was passed, unless the statute makes clear that a different interpretation is required. *Morrisette v. United States*, 342 U.S 246 (1952). Resort to later cases from unrelated circuits is inappropriate.

The Court acknowledges the Hawaii cases cited by counsel, but the Court does not find them persuasive. The case of *Republican Party of Hawaii v. Waihee*, 709 P.2d 980 (Haw. 1985) is cited for the proposition that blank ballots are not counted in elections in the state of Hawaii. The *Waihee* case held that blank ballots were not to be counted in determining a majority of voters on a constitutional provision. The *Waihee* case relied on the *Todman v. Boschulte* case, which this Court has rejected as infirm, resting on plainly inaccurate grounds. But the Hawaii Supreme Court declined to follow *Waihee* in the later case of *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997), where the Hawaii Supreme Court stated clearly "we hold that 'ballots cast' within the meaning of [the Hawaii constitution, the "equivalent" of our Organic Act] includes blank ballots and over votes." Counsel argues that this holding is to be distinguished from *Waihee* because the statute under consideration was compellingly different. It is of no consequence to this Court; even if the Court were to follow Hawaii law, a proposition for which there is no legal precedent, the Court would still count blank ballots.

In the face of obviously conflicting authorities on this elusive issue, the Court is guided by the principle on which this territory has historically resolved its legal issues: the principle of *stare decisis* as enunciated in the *Johnson* case and its progeny. The Court chooses to align itself with the Supreme Court and appellate court decisions of the state from which our laws come, California. No compelling reason has been presented to do otherwise.

Indeed, one court has gone so far as to say that when not all voters vote on an issue, the majority simply cannot be determined. When the issue of whether a majority has been cast is indeterminable, a reelection is necessary. The case of *Greenberg v. Martini*, 339 A.2d 242, 276 (N.J. 1975), held "that in the event any doubt should exist, it should be resolved in favor of requiring an actual majority whenever such can reasonably be determined." Considering the other irregularities surrounding this election, (which this Court declines at this time to address), it can safely be said that it is unclear whether a majority elected the Democratic candidates in the general election on Guam on November 3, 1998.

"Properly qualified voters may not be disfranchised except by their own wilful or deliberate act." *Oviatt v. Behme*, 147 N.E.2d 897 (Ind. 1958). If someone bothers to appear and submit a ballot, there is no authority presented to this Court that that ballot should not be counted. " 'The suffrage is regarded with jealous solicitude by a free people.' " *Bowers v. Smith*, 20 S.W. 101 (Mo. 1892) overruled in part on other grounds 55 S.W. 866 (Mo. 1900). The rule of majority is so much a part of our political system, it should not be denied unless the law so

provides. *Rathjen v. Reorganized School District R-11 of Shelby County*, 284 S.W.2d 516 (Mo. 1955). The law does not clearly provide that the blank ballots should not have been counted. A runoff is required.

The Court understands the arguments of Guam Election Commission members and of the Democratic candidates that as a practical matter, it does no good to order a runoff between the only two candidates which were on the ballot in the first place. They argue that common sense dictates that runoffs were designed for the situation whether there are two top winners of three or more candidates. The Court rejects this otherwise appealing argument for three reasons: (1) The Guam Election Commission did not identify the recipient of the 1219 write-in votes. Perhaps one candidate received all 1219, and if so, logically, these are the top two of three candidates, and a runoff is necessary. (2) More importantly, this Court has been asked to direct the Election Commission to follow a law that the winner of the gubernatorial race receive a majority. The Guam Election Commission certified a race in which the Democratic candidates received 49.82% of the vote and the Republican candidates received 43.56% of the vote, with other candidates receiving 2.65% of the vote. This was the actual report of the General Election, Exhibit 1 to Petitioner's Petition. The Election Commissioners who voted in favor of certification report that they adopted "only column three" of the first page of Exhibit 1, the column showing that the Democratic candidates received 24,250 votes and the Republican candidates received 21,200 votes, and write-in candidates received 1294 votes. They rejected Column Four, which

showed the percentages. Apparently, the zealous Commissioners simply changed the numbers and then certified the election, believing they had support in law to do so. The Court finds otherwise.

This Court is asked to support certification of a result of an election by an election commission which the law simply does not support. The Election Commission certified the Democratic candidates as winners despite receiving 49.82% of the vote. The Court understands that the Democratic candidates were only 83 votes short, and there is no joy in throwing this territory into turmoil, but is this Court to simply ignore the law? To say it was close enough, why worry about the extra few votes is unacceptable. The law does not authorize a casual approach. The Organic Act requires a majority.

The final reason the Court rejects the argument that a runoff is inappropriate when there are only two candidates is that the requirement of a majority is not usually an issue when the election is not close. One would hardly see this dispute if the election results were 70%-30%. The requirement of a majority is important in precisely this situation, where the election is very close, when the results are otherwise extremely unreliable.[11] The requirement of a majority is a built-in safeguard against petty

---

[11] The Court now defers exercising jurisdiction over the other allegations in the Complaint, i.e., 68 precincts reported tabulations that did not match, the transportation of ballots in personal, unaccompanied vehicles, 151 voters with the same social security number voting, hundreds of aliens voting, power outages while electronically counting ballots, votes of non-residents, solicitation of absentee ballots from the hospital on the day of the election, a delay of several days before write-in ballots were counted, during which time the write-in ballots

fraud in a close election, where a small amount of fraud can make an enormous difference. In that case the exact calculation of a majority is all the more important.

The duty imposed under 48 U.S.C. §1422 is on the Guam Election Commission, not on the unsuccessful candidate. The drastic issuance of mandamus is to correct a wrong done by those under a duty to call the re-election. The Guam Election Commission certified the election and a winner with less than fifty percent of the vote. It did so beyond its jurisdiction. Thus, the act was void. The case is now before this Court to correct the Guam Election Commission and direct it to follow the law.

The writ of mandamus issued in this case shall extend to all persons and agencies necessary to conduct the run-off election. The power to issue a writ of mandamus may extend, under appropriate circumstances, to persons who might not be parties to the original action or who may have engaged in wrongdoing, but are in a position to frustrate the implementation of this Court's order or the proper administration of justice. *United States v. New York Telephone Company*, 434 U.S. 159 (1977). Therefore, this mandate shall extend to all individuals and instrumentalities as required by the Guam Election Commission to conduct the runoff election.

---

were left unguarded on several occasions, etc. The Court reserved jurisdiction over this issue in the even the episodic events rise to the level of systematic denial of an individual's vote, which would permit this court to further intervene *per Thompson v. Woodall*, 819 F.2d 1052 (11th Cir. 1987). As matters now stand, there is insufficient evidence of coordinated voter fraud or that fraud permeated this entire election.

The Court contemplates that the runoff election will he ordered to be held in a shorter time period that is stated in the Organic Act, nine rather than fourteen days. In doing so, the Court looks to the case of *Clark v. Roemer*, 750 F.Supp. 200 (M.D.La. 1990) (district court accelerated the election based on time and cost constraints "in light of the public interest in having elections proceed"), *vacated by Clark v. Roemer*, 501 U.S. 1246 (1991) (on broader ground of discrimination and dilution of votes). This Court, too, would like to accelerate the election for reasons of time. The years's end is approaching, with inauguration to immediately follow on January 4, 1999. The Court determines that it is in the territory's best interest to have the election behind them as soon as possible, to have this behind us. For this reason,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Guam Election Commission shall hold a runoff election as referred to in §1422 of the Organic Act. The runoff election between the Democratic and Republican gubernatorial candidates shall be held on Saturday, December 19, 1998.

SO ORDERD this 9th December, 1998.

/s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

Notice is hereby given that this document was entered on the docket on 12/9/98. No separate notice of entry on the docket will be issued by this Court.

Mary L. M. Moran
Clerk, District Court of Guam
By: /s/ Illegible 12/9/98
Deputy Clerk Date

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, Plaintiffs-Appellees, v. GOVERNMENT OF GUAM; et al., Defendants, and CARL T.C. GUTIERREZ; MADELEINE Z. BORDALLO, Real Parties in Interest-Appellants.	No. 98-17306 DC# CV-98-66-JSU Guam ORDER (Filed Dec. 15, 1998)

Before: TROTT and SILVERMAN, Circuit Judges

Appellants' motion to stay the district court's December 9, 1998 order is granted. *See Todman v. Boschulte*, 694 F.2d 939, 940 (3d Cir. 1982).

Appellants' motion to expedite the briefing and hearing schedule is granted. The schedule is as follows: Appellants' opening brief and excerpts of record are due January 11, 1999; appellees' answering brief is due February 5, 1999; and the optional reply brief is due within 14 days after service of appellees' brief. Requests for extensions of time will be strongly disfavored.

The Clerk shall calendar this case during the week of March 8 in San Francisco.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, Plaintiffs-Appellees, v. GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION, and its commissioners; JOSEPH F. MESA, Commissioner; JOSEPH T. DUENAS, Commissioner; FREDERICK J. HORECKY, Commissioner; DOUGLAS B. MOYLAN, Commissioner; ROSANNA D. SAN MIGUEL, Commissioner; LEONILA L.G. HERRERO, Commissioner, Defendants, and CARL T.C. GUTIERREZ; MADELEINE Z. BORDALLO, Real Parties in Interest-Appellants.	No. 98-17306 DC No. CV 98-066 ORDER (Filed May 27, 1999)

Before: TASHIMA, Circuit Judge.

Appellants have made a conditional motion for stay of mandate to enable them to prepare and file a petition

for a writ of certiorari with the United States Supreme Court. The motion was conditioned on the denial of appellants' then-pending petition for rehearing and rehearing en banc. That motion was received by the Clerk on May 24, 1999. On May 25, the petition for rehearing and rehearing en banc was denied.

Appellants' motion is granted. Issuance of the mandate is stayed for a period of 35 days (the period requested by appellants), said 35-day period to commence on June 1 and expire on July 6, 1999.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, Plaintiffs-Appellees, v. GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION, and its commissioners; JOSEPH F. MESA, Commissioner; JOSEPH T. DUENAS, Commissioner; FREDERICK J. HORECKY, Commissioner; DOUGLAS B. MOYLAN, Commissioner; ROSANNA D. SAN MIGUEL, Commissioner; LEONILA L.G. HERRERO, Commissioner, Defendants, and CARL T.C. GUTIERREZ; MADELEINE Z. BORDALLO, Real Parties in Interest-Appellants.	No. 98-17306 DC No. CV 98-066 **ORDER** (Filed May 25, 1999)

Before: NOONAN and TASHIMA, Circuit Judges, and RESTANI, Court of International Trade Judge.*

---

* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

The panel has voted to deny the petition for rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges Noonan and Restani so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

Title 3 Guam Code Annotated § 11111. Imperfectly Marked Ballots Void. At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.

Title 3 Guam Code Annotated § 11114. Only Invalid Portions Rejected. If a voter indicates either:

(a) By placing his marks in the voting squares adjacent to the names of any candidates, or

(b) By writing the names of persons for an office in the blank spaces, or

(c) By a combination of both, the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.